STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. COOLEY,

Plaintiff-Appellant,

v

ROBERT ALLAN MCPHARLIN and CUNNINGHAM GLASS COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED
September 26, 2006

No. 269050
Macomb Circuit Court
LC No. 2005-002570-NI

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court order granting summary disposition under MCR 2.116(C)(7) to defendants on plaintiff's claim for personal injuries sustained in an automobile accident. Because we find that plaintiff executed a full release, we affirm the trial court. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when his car was struck in a parking lot by a truck owned by defendant Cunningham Glass Company, Inc., and driven by its employee, defendant Robert Allan McPharlin. After the accident, Cheryl Cleyman, an insurance adjuster for Progressive Insurance Company, Inc., which insured Cunningham Glass and McPharlin, contacted plaintiff to obtain a medical release in order to review plaintiff's medical file and handle his claim. Plaintiff provided the medical authorizations. According to plaintiff, after Cleyman reviewed the file, she contacted plaintiff and told him that there was nothing that Progressive Insurance could do for him but that it was willing to give him $1,000 as an "inconvenience fee" and told him that it was not necessary for him to contact an attorney. While plaintiff was still experiencing pain, but after he consulted with his doctor, plaintiff accepted a $1,000 check on November 25, 2002, three weeks after the accident. The check was payable to plaintiff and his wife. The front of the check also included the payment note, "In Payment of FULL & FINAL SETTLEMENT FOR ANY AND ALL BODILY INJURY CLAIMS."

After plaintiff and his wife signed and cashed the check, plaintiff complained of increased pain. He began treating with another physician, who referred him for chiropractic therapy and pain management. On March 5, 2004, plaintiff had an MRI that showed right paracentral herniation with pressure on the right nerve root with disc space degeneration at L4/L5. Further medical studies indicated central herniation at L5/S1 with pressure on the nerve.

Plaintiff finally had a L5/S1 dissectomy and a 360-degree fusion of the L5/S1 segment on April 8, 2005.

Plaintiff filed this lawsuit on June 27, 2005, alleging negligent and grossly negligent operation of a motor vehicle resulting in serious and permanent bodily injury. After defendants answered the complaint, they moved for summary disposition under MCR 2.116(C)(7). Defendants argued that the language on the check for $1,000 was a release, and that by signing and cashing the check plaintiff and his wife effectively released all their claims against both defendants. The trial court initially denied defendants' motion because discovery was still open. But, the court later granted defendants' renewed motion and dismissed plaintiff's complaint with prejudice. The trial court reasoned that the check was a valid release of all claims stemming from the accident. We concur with the result and reasoning of the trial court.

On appeal, plaintiff claims that the trial court erred in finding that the language on the front of the check was a release that discharged both defendants because under MCL 600.2925d(a) a release applies only to parties specifically released. Plaintiff maintains that the check only references Cunningham Glass and because it does not reference McPharlin, it does not release McPharlin.[1]

"A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release." *Xu v Gay*, 257 Mich App 263, 272; 668 NW2d 166 (2003). If the text of the release is clear, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. If the terms of the release are clear, the effect of the language is a question of law to be resolved summarily. *Id.* See also *Adair v State*, 470 Mich 105, 127; 680 NW2d 386 (2004). The specific terms of the release control its scope. *Romska v Opper*, 234 Mich App 512, 519; 594 NW2d 853 (1999). Further, a release typically discharges only the persons specified by its terms. MCL 600.2925d.

The language of the release inscribed on the front of the check stated: "In Payment of FULL & FINAL SETTLEMENT FOR ANY AND ALL BODILY INJURY CLAIMS." On the check, the insured was identified as "CUNNINGHAMGLASS." The claimant was identified as "COOLEY, MICHAEL." And the date of loss was identified as "11/4/2002." The payees were identified as MICHAEL COOLEY, A MARRIED MAN AND RENEE COOLEY, INDIVIDUALLY AND AS HUSBAND AND WIFE." However, the check did not reference McPharlin.

In deciding defendants' motion for summary disposition, the trial court relied on this Court's decision in *Romska*, *supra.* The difficulty in applying *Romska* to this case is that the release in *Romska* identified particular individuals and a determinable class of people as the recipients of the release, whereas the release in this case does not. It only references Cunningham Glass as an insured and does not reference McPharlin at all. However, under both

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[1] Although plaintiff did not raise this specific argument in the circuit court, he did generally argue that the language on the front of the check did not release Cunningham Glass or McPharlin. Therefore, we will address this variation of his general argument.

Romska and MCL 600.2925d, the actual terms of the release control. Thus, we conclude that the release discharged both Cunningham Glass and McPharlin because the expansive language on the check specifically state that the payment is for the "FULL & FINAL SETTLEMENT FOR ANY AND ALL BODILY INJURY CLAIMS," which includes "any and all" claims that plaintiff had against either Cunningham Glass or McPharlin arising from the accident, even though McPharlin is not specifically identified by name on the check from Progressive Insurance. Accordingly, plaintiff's claim lacks merit.

Plaintiff's claim that both he and the defendants were mutually mistaken regarding the basis of the release also fails. A "party challenging a release bears the burden of establishing its invalidity." *Gortney v Norfolk & Western Railway Co*, 216 Mich App 535, 542; 549 NW2d 612 (1996). The burden may be met by showing that the release was executed under a mutual mistake of fact. *Id.* To establish a mutual mistake of fact, a plaintiff must show that, "at the time the release was executed, both parties were mistaken concerning an existing fact that was material to the agreement." *Id.* If the release is "a general release of all claims, a mutual mistake can vitiate the effect of [the] release only if neither party intended the agreement to be a general release." *Id.* at 543.

In this case, even if both parties were mistaken regarding plaintiff's actual injuries, plaintiff did not show that neither he nor Progressive Insurance intended the agreement to be a general release. The language of the release, "any and all claims for bodily injury," is clearly a general release. Thus, even if both parties were mistaken regarding the state of plaintiff's injuries, the mistake would not vitiate the release.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper